UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

ROBINSON AVIATION (RVA), INC. [1]

Employer

and

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION, INC. (PATCO),

Case 12-RC-9349

Petitioner

and

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION (PATCO) affiliated with FEDERATION OF PHYSICIANS AND DENTISTS, NATIONAL UNION OF HOSPITAL AND HEALTHCARE EMPLOYEES, AMERICAN FEDERATION OF STATE, COUNTY, and MUNICIPAL EMPLOYEES, AFL-CIO[2]

Intervenor

DECISION AND DIRECTION OF ELECTION

Robinson Aviation (RVA), Inc. (the Employer) provides aviation support services at the airport located in Opa Locka, Florida, pursuant to a contract with the Federal Aviation Administration.[3] On December 17, 2008, the Professional Air Traffic Controllers Organization, Inc. (Petitioner) filed a petition with the

[1] The Employer's name appears as amended at the hearing.
[2] Although the Intervenor's name appears in the transcript as "Professional Air Traffic Controllers Organization, Inc. (PATCO), FPD, NUHHCE, AFSCME, AFL-CIO," this is simply an abbreviated version of the Intervenor's full name.
[3] The parties stipulated that the Employer, a Virginia corporation with its principal office located in Oklahoma City, Oklahoma, is engaged in the business of providing aviation support services at selected airports in the United States, including the airport at Opa Locka, Florida, under contract with the Federal Aviation Administration (FAA).

National Labor Relations Board (the Board) under Section 9(c) of the National Labor Relations Act (the Act), seeking to represent a unit of air traffic control specialists employed by the Employer at the Opa Locka airport. There are currently approximately five employees in the petitioned-for unit.

In October 2002, the Employer voluntarily recognized the Professional Air Traffic Controllers Organization, affiliated with Federation of Physicians and Dentists, National Union of Hospital and Healthcare Employees, American Federation of State, County, and Municipal Employees, AFL-CIO (the Intervenor) as the exclusive collective-bargaining representative of the non-supervisory air traffic control specialists employed by the Employer at the Opa Locka airport.[4] In the instant proceeding, the Intervenor contends, contrary to the Petitioner, that the Opa Locka employees do not comprise a separate appropriate unit because they have been merged into a unit of air traffic control specialists employed by the Employer at 23 airports, [5] including Opa Locka, which the Intervenor contends is the only appropriate unit. The terms and conditions of employment of the air traffic control specialists at these 23 airports have been covered by a collective-bargaining agreement between the Intervenor and the Employer that is effective by its terms for 42 months, from September 19, 2005, to March 18, 2009, (herein called "the master cba").[6]

[4] No recognition agreement is in evidence.
[5] The 23 airports are Isla Grande (San Juan) and Aguadilla, Puerto Rico; St. Petersburg, Key West, Craig Field, Naples, Stuart, Pompano Beach, Opa Locka, Cecil Field, Boca Raton and Titusville, Florida; Wiley Post and Lawton, Oklahoma; St. Croix, U.S. Virgin Islands; Tyler, Arlington and Grand Prairie, Texas; Gwinnett County, Georgia; Hickory and New Bern, North Carolina; and Hilton Head and Donaldson, South Carolina. However, as noted below, the Petitioner was recently certified in separate units at Isla Grande and Aguadilla.
[6] There is no contract bar to the petition.

A hearing officer of the Board conducted a hearing, and the parties were given the opportunity to submit briefs.[7] I have considered the evidence and arguments presented by the parties. The sole issue before me is whether the unit sought by Petitioner, air traffic control specialists employed at the Opa Locka airport, is an appropriate unit, or whether these employees have been merged into a single unit covered by the master cba. As explained below, I conclude that the unit the Petitioner seeks to represent is an appropriate unit because it was not timely merged into the multi-location unit urged by the Intervenor, and it remains a separate appropriate unit. Accordingly, I shall direct an election in the petitioned-for unit.

I take administrative notice of a number of other Board representation proceedings involving petitions filed by the Petitioner or Intervenor herein seeking certification as the representative of the Employer's employees in certain single location bargaining units whose terms and conditions of employment have been set forth in the master cba covering 23 airports.

On December 3, 2008, the Petitioner filed a petition in Robinson Aviation (RVA), Inc., Case 12-RC-9347, seeking certification as representative of the air traffic control specialists employed by the Employer at the Pompano Beach, Florida airport. The Intervenor intervened in that case and argued that the only appropriate unit must include all locations covered by the master cba.[8] A hearing officer of the Board conducted a hearing. On January 15, 2009, the

[7] I have considered the briefs submitted by the Petitioner and the Intervenor. Although the Employer participated during a portion of the hearing herein by telephone, it did not file a brief.
[8] The Intervenor had been certified as the exclusive collective-bargaining representative of the single facility Pompano Beach unit on December 17, 1999. At the time of that certification, the name of the Employer was Robinson-Van Vuren Associates, Inc.

undersigned issued a Decision and Direction of Election, finding that the petitioned-for unit was an appropriate unit, and directing an election in that unit. On December 15, 2008, the Petitioner filed a petition in Robinson Aviation (RVA), Inc., Case 16-RC-10870, seeking certification as representative of the air traffic control specialists employed by the Employer at the Tyler, Texas airport.[9] A hearing was recently conducted in that case, and it is expected that a decision will issue imminently.

Decisions and Directions of Election issued in the other three related proceedings, and certifications have also issued in some of them. On August 13, 2008, the Regional Director for Region 24 issued a Decision and Direction of Election in Robinson Aviation, RVA, Inc. and Computer Intelligence Squared, Inc., Cases 24-RC-8607 and 24-RC-8608, finding separate appropriate units limited to air traffic control specialists working at the Isla Grande Airport in San Juan, Puerto Rico (Case 24-RC-8607) and at the Rafael Hernandez Airport in Aguadilla, Puerto Rico (Case 24-RC-8608). Pursuant to the outcome of Board elections held on September 10, 2008, the Petitioner was certified as the representative of the two units involved in the Region 24 cases on September 23, 2008.

On August 25, 2008, the Regional Director for Region 11 issued a Decision and Direction of Election in Robinson Aviation (RVA), Inc., Case 11-RC-6705, finding an appropriate unit limited to air traffic control specialists employed by the Employer at its Donaldson Center Tower, located in Greenville, South

[9] The Decision and Direction of Election in Case 12-RC-9347 states the wrong filing date for this petition.

Carolina. The Decision and Direction of Election in Case 11-RC-6705 is pending before the Board pursuant to its grant of the Intervenor's request for review.

On October 16, 1996, in a case filed by the Intervenor involving the Employer herein (then called Robinson VanVuren Associates, Inc.), Case 12-RC-7999, I directed an election among the Stuart, Florida, air traffic control specialists, as sought by the Intervenor. In that case, the Employer had contended that only a multi-facility unit was appropriate (52 tower sites nationwide, or alternatively 23 sites in the southeastern United States, Puerto Rico and the U.S. Virgin Islands). On December 4, 1996, the Intervenor was certified at the single facility unit located in Stuart, Florida. As noted previously, the Stuart location is covered by the master cba.

I also take administrative notice of the Decision and Direction of Election issued on August 13, 2007, by the Regional Director for Region 7 in Midwest Air Traffic Control Service, Inc., Cases 7-RD-3576, 9-RD-2147, 13-RD-2568, 13-RC-21643, 22-RC-12816, 30-RC-6686, and 30-RC-6692 (referred to herein as the Midwest Air Traffic cases). The consolidated Midwest Air Traffic cases involved the Petitioner, Intervenor and another employer, Midwest Air Traffic Control Service, Inc. (Midwest Air Traffic), which succeeded the Employer as the provider of air traffic control services at various airports that are not involved in the instant proceeding. The relevant aspects of the Midwest Air Traffic cases are described further herein.

In the sections that follow, I will set forth the applicable principles and then apply the law to the facts herein.

I. Applicable Principles

An election to decertify or replace an incumbent collective-bargaining representative is generally held in the certified or contractually-defined unit. Mo's West, 283 NLRB 130 (1987); Campbell Soup Co., 111 NLRB 234 (1955). However, the Board has long recognized a "merger doctrine," under which an employer and union can agree to merge separately certified or recognized units into one overall unit. Wisconsin Bell, 283 NLRB 1165 (1987). Thus, "It is axiomatic that parties to a collective-bargaining relationship may, by contract, bargaining history, and a course of conduct, merge existing certified units into multiplant appropriate units." White-Westinghouse Corp., 229 NLRB 667, 672 (1977), citing General Electric Co., 180 NLRB 1094, 1095 (1970).

To determine the parties' intent, the Board weighs the contract, the bargaining history, and the parties' course of conduct. See e.g. Duval Corp., 234 NLRB 160, 161 (1978) (finding no merger where the parties failed to amend the recognition clause and engaged in departmental negotiations to set wage rates and lines of progression for employees who had separate immediate supervisors and no interchange); General Electric, 180 NLRB 1094, 1095 (1970) (dismissing petition to decertify employer at single location, notwithstanding reference in national collective-bargaining agreements to "units," negotiation of supplemental agreements on the local level, and absence of any explicit admission on the record that parties intended to merge separate units, because these factors were outweighed by long continuous bargaining history of multiplant bargaining, and

the manner of negotiation, execution, coverage and application of the agreements between the parties).

Furthermore, the "Board does not find a merger in the absence of unmistakable evidence that the parties mutually agreed to extinguish the separateness of the previously recognized or certified units." Utility Workers Local 111 (Ohio Power Co.), 203 NLRB 230, 239 (1973), enfd. 490 F.2d 1383 (6th Cir. 1974). Thus, the evidentiary threshold is high in order to maximize the expression of employee free choice. Even if such unmistakable evidence is demonstrated, the Board has declined to apply the merger doctrine to block an election where the period of time between the "unequivocal appearance" of a merger and the filing of a petition was " 'of brief duration,' i.e., less than a year." See West Lawrence Care Center, 305 NLRB 212, 217 (1991).

I will now analyze the evidence with respect to the master cba, the bargaining history, and the course of conduct, in determining whether the record reflects that the Opa Locka unit was timely merged into a multi-location unit.

II. Contract, Bargaining History, and Course of Conduct

The Master Collective-Bargaining Agreement

The only collective-bargaining agreement in the record is the master cba, effective from September 19, 2005, to March 18, 2009, covering, on its face, 23 locations. It appears from the record in the instant proceeding that by the time the Employer recognized the Intervenor as the exclusive representative of the air traffic control specialists at Opa Locka (in October 2002), the Employer and the Intervenor had executed at least one or two prior collective-bargaining

agreements.[10] It appears from the records in the related proceedings cited above that both of these agreements covered multiple locations.[11] It further appears that prior collective-bargaining agreements between the Employer and the Intervenor have contained the same provision for voluntary recognition at additional facilities as discussed further below.

One factor in determining whether contractual language reflects the clear intent to merge separate units is the language of the recognition clause. The master cba, which shows it was signed on September 30, 2005, has a number of references to collective-bargaining "units," as opposed to "unit", as follows:

> The Preamble states:
>
> This Agreement is made and entered into by and between [the Employer] and [the Intervenor] on behalf of the employees of the Employer identified in Article 5 hereof employed in the bargaining **units** listed in Annex A. (Emphasis added).
>
> Article 2, Section 1 (Negotiations and Exclusive Recognition – The Union) states:
>
> The Employer recognizes [the Intervenor] as the exclusive representative for the bargaining **units** listed in Annex A, for the purpose of collective bargaining in all matters relating to wages, hours of employment, and other terms and conditions of

[10] It appears from the records of these proceedings that there were at least two collective-bargaining agreements between the Employer and the Intervenor preceding the master cba, though no other agreement is in the record. The dates of negotiation of the collective-bargaining agreements that preceded the current master cba are unclear. In the instant proceeding, the Intervenor's National Field Representative testified that the prior collective-bargaining agreements were negotiated in early 2000 and in 2002. In Case 16-RC-10870, involving the Tyler, Texas airport, the same witness for the Intervenor initially testified that the prior collective-bargaining agreements were negotiated in late 1999 or early 2000, and in 2001, and he then testified that they were negotiated in 2000 and in 2003.

[11] The record does not reflect what the other locations were, or which locations were covered by the earlier collective-bargaining agreements. The Intervenor's National Field Representative testified in Case 12-RC-9347 that the collective-bargaining agreement negotiated in 1999 covered seven (7) airport locations, including Pompano Beach. However, he also testified in the instant proceeding that five of the 23 locations covered by the master cba were covered by that collective-bargaining agreement.

> employment for all employees in the bargaining **units** as determined by the [NLRB]. (Emphasis added).
>
> Article 5, Section 1 (Coverage – Inclusions) states, in relevant part:
>
> This Agreement covers all full-time and part-time employees in the following classification [sic] and positions as described in the certifications of bargaining **units** issued by the [NLRB]… (Emphasis added).
>
> Article 9, Section 5(B) states:
>
> Nepotism policies shall be uniformly administered throughout the bargaining **units**. (Emphasis added).
>
> Article 10, Section 6 is titled "Bargaining **Units**" but states:
>
> The Union may semi-annually request and the Employer will provide an updated list including the names, addresses, classification, and position of each member of the bargaining **unit**. (Emphasis added).

Other provisions of the master cba refer to "the unit" or "bargaining unit employees" rather than "units."[12] In addition, an unsigned page titled "Definition of Terms" dated "8/20/06" which is attached to the master cba defines "bargaining unit" as "[a]ll employees represented by the Union."

The other provisions that are germane to the scope of the unit or units covered by the master cba include Article 2, Section 2 and various "annexes." Article 2, Section 2 provides that the Employer's "Manager agrees to recognize and work with the PATCO [Intervenor] Facility Representative or his/her designee," that the "Facility Representative shall be the single point of contact on

[12] Article 5, Section 3 (new positions/classes); Article 9, Section 2 (union activity); Article 14, Section 5 (position descriptions); Article 14, Section 7(A) (performance appraisals); Article 19, Section 3 (defining grievances); and Article 34, Section 5 (qualifications) refer to "the unit." Article 8, Section 3 (employer rights); Article 14, Section 5 (position descriptions); Article 14, Section 7(B) (performance appraisals); Article 24, Section 2 (occupational safety and health); Article 27, Sections 1 and 2 (facility cleanliness); Article 28, Sections 1 to 4 (surveys and questionnaires); Article 32, Sections 2 to 4 (Controller-in-Charge); Article 34, Section 6 (qualifications), and Article 35, Section 3(B) (facility evaluations) refer to "bargaining unit employees."

all matters between the Manager and the Union which are internal to the facility," and that "the Employer further agrees to work with National PATCO representatives on union – management issues external to the facility."

Annex C sets forth varying hourly base wage rates applicable to air traffic control specialists at the 23 covered locations.[13] Annex D sets forth varying vacation and holiday benefits "for bargaining unit employees" at the 23 locations.

In light of the ambiguity created by the reference to "units" particularly in the preamble, and Articles 2 and 5 of the master cba, relating to recognition and description of the bargaining "units," as well as the other language described above, I find that the language of the master cba in existence prior to July 2008, fails to establish unmistakable evidence that the Employer and the Intervenor intended to create a multi-location unit. The current version of Annex A executed in July 2008, is discussed below.

Bargaining History and Course of Conduct

The Intervenor's National Field Representative[14] testified that the Opa Locka air traffic control specialists have never been covered by a collective-

[13] Although unclear, it appears that variations in wage rates among the various locations covered by the master cba may have been affected by the provisions of the Service Contract Act. The effect of the Service Contract Act was noted by the Regional Director in the Midwest Air Traffic cases, supra, when Midwest succeeded the Employer herein as the service contractor to the FAA. As the Regional Director explained in the Midwest Air Traffic decision, certain benefits paid by Midwest at locations where it succeeded the Employer were subject to Section 4(c) of the Service Contract Act, 41 U.S.C. Sec. 353(c), which generally mandates that successor federal contractors shall pay their service employees no less than the wages and fringe benefits provided for in a collective-bargaining agreement covering the employees of the predecessor contractor until a new collective-bargaining agreement is negotiated by the successor employer. In addition, at the hearing in Case 16-RC-10870, the Intervenor's National Field Representative testified that pursuant to the Service Contract Act, the U.S. Department of Labor (DOL) issues periodic wage determinations for air traffic control specialists in each county covered by the master cba, and the Intervenor and the Employer negotiate an additional uniform percentage wage increase for all 23 locations, which is applied to the wage rate for each location established by the DOL wage determination.

bargaining agreement that applied only to their location. He testified in Case 12-RC-9347 that the Employer has never requested bargaining over single locations, but has at all times bargained with the Intervenor over the wages, hours, and terms and conditions applicable to all covered locations.

Despite this testimony, the record reflects that the Intervenor and the Employer have had a collective-bargaining relationship for a number of years,[15] and have negotiated at least three successive collective-bargaining agreements, yet they have not amended the recognition clause to reflect the existence of a nationwide unit, and continued to refer to "units," including in the master cba. This undermines the claim that there is "unmistakable evidence" of mutual intent to extinguish the separately certified and/or recognized units. Duval, 234 NLRB 160, 161 (1978) ("had the parties truly desired to create a large unit among all the employees subject to the contract, they could easily have described such a broad unit in the recognition clause"); Goodyear Tire & Rubber, 105 NLRB 674, 676 (1953) (reference in contract recognition clause to "units" in plural argues against finding multi-plant unit).

The National Field Representative testified that negotiations for the master cba took place mainly at the Orlando, Florida office of the Employer's Vice President.[16] Air traffic control specialists at the 23 locations apparently did not

---

[14] This individual, Gerald Tuso, testified in the instant proceeding that his title is "Organizer, contract negotiator, and administrator" for the Intervenor. He referred to his position as the Intervenor's National Field Representative when testifying in Case 12-RC-9347, and as the Intervenor's "national coordinator" when testifying in Case 16-RC-10870. As my Decision in Case 12-RC-9347 already issued, I will continue to refer to Tuso as the National Field Representative.

[15] As noted above, the Certification of Representative in Case 12-RC-7999 issued on December 4, 1996.

[16] In Case 12-RC-9347, the National Field Representative testified that these negotiations also took place at the Intervenor's office in Tallahassee, Florida.

participate directly in the bargaining process that resulted in the master cba. The Intervenor's National Field Representative testified that he receives input for bargaining proposals from members through newsletters and e-mails, and also receives input from members through telephone calls to the facility representatives.

The master cba was not formally ratified, either by air traffic control specialists at Opa Locka separately, or at all locations as a whole. Instead, the Intervenor informed its facility representative at each location of the terms of the master cba, and these representatives were asked to inform the dues-paying bargaining unit members in any way they chose, whether at a meeting, by telephone, by e-mail, or by posting a summary of terms on the bulletin board. [17]

Annex A to the master cba is a Memorandum of Understanding identifying the airport locations then covered by the master cba. It appears from the record that the Employer and the Intervenor have executed at least two versions of Annex A. The earlier version of Annex A in the record is labeled, "Revised 10/28/07" (herein called the 2007 version). This version states, in relevant part:

> PATCO [the Intervenor] and RVA [the Employer] have entered into a master labor agreement covering these facilities.
>
> It is understood and agreed that, if and when PATCO is certified by the NLRB as the collective bargaining agent for an additional facility or facilities, such facility or facilities will automatically be covered by the master agreement, (except for Annex B)[18] effective with the

[17] Although the National Field Representative testified in Case 12-RC-9347 that the purpose of such communications by the local representative was to obtain "a vote" of the air traffic control specialists, it appears from the record that no numerical tally was maintained and that the procedure was less formal than a traditional ratification "vote."

[18] Annex B to the master cba contains separate terms pertaining to employee lockers at Stuart, Florida, Gwinnett County, Georgia, and Isla Grande, Puerto Rico.

> date of the NLRB certification without additional negotiations and will be subject to the terms and conditions thereof.

It appears from the record in the instant case that the Intervenor and the Employer put the 2007 version of Annex A into effect on or about October 28, 2007, and that the language quoted above was part of the master cba from September 30, 2005, through October 28, 2007, and was also possibly part of the prior collective-bargaining agreements between the Employer and the Intervenor. Further, I take administrative notice of the record in Case 16-RC-10870, which contains the 2007 version and testimony of the Intervenor's National Field Representative that this version was the one in effect prior to July, 2008. [19]

On July 9, 2008, and July 14, 2008, respectively, the Employer and the Intervenor executed the current version of Annex A, which states "Revised 7/9/08." Like the 2007 version, the current version lists the 23 locations then covered by the cba. The current version of Annex A further states, in relevant part:

> PATCO [the Intervenor] and RVA agree that, while PATCO was certified separately in each of these locations by the [NLRB], or granted voluntary recognition by the employer, the employees at these locations have been **merged into one bargaining unit** (emphasis added).
>
> It is understood and agreed that, if and when PATCO is certified by the NLRB as the collective bargaining agent, or granted voluntary recognition, for an additional facility or facilities, such facility or facilities will automatically be covered by the master agreement, (except for annex B) and the employees at such facilities will be **merged into this single bargaining unit** (emphasis added).

[19] In its brief, the Intervenor contends that the language in the 2007 version quoted above "existed for over eight years."

The Intervenor's National Field Representative testified that the Intervenor and the Employer negotiated the current version of Annex A in response to the Decision and Direction of Election issued in the Midwest Air Traffic cases. As found by the Regional Director of Region 7, Midwest Air Traffic contracts with the FAA to provide air traffic control services at various airports, and had one or more collective-bargaining agreements with the Intervenor covering those airports. Petitioner sought recognition as the representative of single location bargaining units at some of the individual airports, and the Intervenor contended that single location units were not appropriate because they had been merged into one national unit. Although the Midwest Air Traffic cases involved a different set of airports than those involved herein, in those cases the Regional Director for Region 7 found that the Employer preceded Midwest Air Traffic as the employer at some of the locations involved therein, and that "[t]he March, 2001, contract between RVA and [Intervenor] … granted recognition to [the Intervenor] for the 'bargaining units' and contained nothing compelling the conclusion that a multi-location unit was contractually created to supplant the Board-certified ones." In the Midwest Air Traffic cases, the Regional Director for Region 7 concluded that single location units were appropriate.

The Intervenor's National Field Representative testified that, after the Region 7 decision issued in the Midwest Air Traffic cases, he was concerned that the NLRB would reach a similar conclusion with respect to the unit or units covered by the master cba with the Employer. He testified that he "determined the master bargaining agreement with [the Employer] needed some language

change." He contacted the Employer's Vice President, Wil Mowdy, to negotiate the change. The record does not reflect that the word "merged" appeared in the master cba, or in any annex to the master cba, until July 2008.

The Intervenor's National Field Representative testified that he and Mowdy negotiated Annex A over the phone, and that the negotiations leading to the merger language in Annex A lasted for "probably four or five months." I take administrative notice of the National Field Representative's conflicting testimony in Case 12-RC-9347, involving the Petitioner's petition to represent the air traffic control specialists at the Pompano Beach location. In that case, the National Field Representative testified that he and Mowdy negotiated the current version of Annex A during approximately three sessions, over a period of roughly two months. I also note that in Case 11-RC-6705, the Regional Director for Region 11 found that the Intervenor and the Employer negotiated over six months, beginning in mid-January, 2008 and concluding in June or July, 2008, before reaching an agreement to add merger language to Annex A. I further note that the record in Case 11-RC-6705 reflects that the Employer and Intervenor exchanged proposals concerning the content of the merger language, by phone, fax, and e-mail, but that the documents reflecting the content of these exchanges were destroyed.[20]

In short, I find that the testimony of the Intervenor's National Field Representative with respect to the negotiations leading to the current merger

[20] In this regard, Employer representative Mowdy did not testify in the instant proceeding. In addition, there is no indication in the record that the Intervenor attempted to obtain copies of the electronic mail messages and fax exchanges concerning negotiations to revise Annex A from the Employer.

language in Annex A is inconsistent, and fails to support the Intervenor's position that the July 2008 version of Annex A merely memorialized the pre-existing intent (i.e. before July 2008) of the Intervenor and the Employer to create a merged bargaining unit.

Moreover, if the Employer and Intervenor were merely revising Annex A in July, 2008, to memorialize an earlier agreement, there would have been no need for bargaining, whether of two months' duration or six. Further clouding the Intervenor's contention that Annex A merely memorialized a long existing agreement to merge the units is the fact that 11 months passed from the time of the Region 7 Decision in the Midwest Air Traffic cases, which issued on August 13, 2007, to July, 2008, when Annex A was executed. Finally, nothing in the revised language of Annex A states that the parties are memorializing a prior understanding. The phrase "have been merged" does not signify when or how a merger took place.

Neither the Opa Locka air traffic control specialists nor air traffic control specialists at any other location represented by the Intervenor were given the opportunity to vote over the adoption of the unit merger provision in the current Annex A. The National Field Representative testified that none of the air traffic control specialists were informed of the revision to Annex A because he had always considered them to constitute a merged (multi-location) unit, and because the employees had never been told that they belonged to separate units.[21]

[21] The Intervenor's National Field Representative testified in Case 12-RC-9347 that he informed these employees only that "there were going to be some changes concerning a memorandum of understanding for a merged unit." He could not recall to whom he spoke.

Intervenor cites Albertson's Inc., 307 NLRB 338 (1992), but in that case, as mentioned by the Regional Director in the Midwest Air Traffic cases, the Board found merger based on evidence, which is essentially absent here, that the parties explicitly discussed and exchanged writings on the merger.

In sum, the record does not establish that the parties had agreed to merge the separate units into one multi-location unit prior to revising Annex A in July 2008. Instead, the record establishes that the Intervenor and the Employer had "a practice of centralized bargaining for separate bargaining units rather than … a practice of bargaining for one overall unit." Duval Corp., 234 NLRB 160, 161 (1978). Without unmistakable evidence from the contract, bargaining history, or the parties' course of conduct, I conclude that the parties did not mutually assent to the merger of the separately certified or recognized single location units of the Employer's air traffic control specialists prior to July 2008.

Therefore, it appears from the record that the Opa Locka air traffic control specialists existed as a single location unit for six years prior to 2008. I find that in light of the relatively short period since July 2008, when these employees became part of a merged unit, the balance of employee free choice measured against the stability of bargaining relationships must be struck in favor of providing these employees with the freedom to choose their collective-bargaining representative. See West Lawrence Care Center, 305 NLRB 212 (1991) (declining to apply merger doctrine to block an election given employees' lengthy

bargaining history as single employer unit compared to relatively brief history of bargaining as multi-employer unit).[22]

The appropriateness of the petitioned-for unit is further supported by the following factors, all of which demonstrate that the Opa Locka airport retains an identity separate and distinct from the remaining locations. There is no record evidence of interchange between air traffic control specialists at the Opa Locka facility and those at any of the other locations covered by the master cba, or of work related contact between employees at different locations.[23] Each location has its own air traffic manager, also known as the tower manager, and each has its own union facility representative.[24] Air traffic control specialists must receive FAA training specific to their tower, in addition to receiving FAA training required for all air traffic control specialists. Grievances arising under the master cba are first handled locally by the facility representative and the air traffic manager

[22] The Board in West Lawrence Care Center found that, where the "period between the unequivocal appearance of a multi-employer unit and the filing of the [petition] was of 'brief duration,' i.e. less than a year … we will not apply the Board's unit merger doctrine to block an election in the single-employer unit." Id. at 217. Here, the multi-location unit unequivocally appeared in July, 2008, about five months before Petitioner filed the petition. Although West Lawrence Care Center involved a multi-employer unit, rather than a multi-location unit of a single employer, the Board therein discussed other cases involving multi-location units of single employers and indicated that similar interests were at stake in both types of cases. 305 NLRB at 217, fn 25. West Lawrence Care Center has subsequently been discussed in other cases involving a multi-location unit of a single employer. See, for example, Albertson's, Inc., 307 NLRB 338 (1992),

[23] Article 22 of the master cba provides that employees who desire transfer to another facility may apply in writing to the Area Manager in which the facility is located, and if a vacancy occurs for which the employee is qualified, the employee shall be given priority consideration before a new employee is hired, provided that the Area Manager determines that staffing requirements can accommodate the transfer. There is no record evidence of any such transfers involving the Opa Locka facility or the other facilities listed in Annex A of the master cba. The Region 11 decision and my decision involving the Pompano Beach location also note the lack of employee interchange among different facilities.

[24] The air traffic managers each report to an area manager, who oversees several towers. It appears from the record in Case 16-RC-10870 that the area managers exercise supervisory authority over air traffic control specialists and the air traffic manager, within the meaning of Section 2(11) of the Act.

(although if the grievance is not resolved at this step, it is forwarded to the area manager, and ultimately to the Employer's Vice-President, Mowdy). As set forth in Article 21, Sections 1(A), 3(A) and 3(B) of the master cba, seniority for the purposes of layoff and recall is based on length of service at a particular facility. Finally, wage rates and benefits differ between locations covered by the master cba, although the Intervenor negotiates a uniform percentage wage increase for all locations.[25]

Based upon the foregoing evidence, and the record as a whole, I find that the air traffic control specialists employed at the Opa Locka airport constitute a separate unit that is appropriate for collective bargaining.

Conclusions and Findings

A. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

B. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

C. The Petitioner and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act, and each claims to represent certain employees of the Employer.

[25] As noted, the facts here support a finding of a history of a separate appropriate unit at Opa Locka existing until July 2008. Absent a history of bargaining, the facts herein, as well as the presumptive appropriateness of a single facility unit, would independently support a finding that the Opa Locka air traffic control specialists are a separate appropriate unit.

D. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and 2(7) of the Act.

E. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> **Included: All full-time and regular part-time Air Traffic Control Specialists employed at the airport located at Opa Locka Executive Tower, 14880 NW 44th Court, Miami, Florida.**
>
> **Excluded: all other employees, office clerical employees, guards, and supervisors as defined in the Act.**

Direction of Election

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether they wish to be represented for purposes of collective bargaining by the Petitioner, Professional Air Traffic Controllers Organization, Inc. (PATCO), or by the Intervenor, Professional Air Traffic Controllers Organization (PATCO), affiliated with Federation of Physicians and Dentists, National Union of Hospital and Healthcare Employees, American Federation of State, County, and Municipal Employees, AFL-CIO, or by neither labor organization. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees

who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in military service of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or have been discharged for cause since the designated payroll period; (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and (3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility

list containing the full names and addresses of all eligible voters. North Macon Health Care Facilities, 315 NLRB 359 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 201 East Kennedy Blvd., Suite 530, Tampa, FL 33602, on or before **February 2, 2009**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. Since the list will be made available to all parties to the election, please furnish three copies of the list.[26]

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the Election Notice.

[26] The list may be submitted by facsimile transmission to (813) 228-2874, or electronically, as well as by hard copy. See www.nlrb.gov for instructions about electronic filing. Only one copy of the list should be submitted if it is sent electronically or by facsimile.

Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the Election Notice.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST **on February 9, 2009.** The request may not be filed by facsimile, but may be filed electronically.[27]

DATED at Tampa, Florida **this 26th day of January, 2009**.

Rochelle Kentov, Regional Director
National Labor Relations Board, Region 12
201 E. Kennedy Boulevard, Suite 530
Tampa, Florida 33602

[27] See www.nlrb.gov for instructions about electronic filing.